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SUPREME COURT OF THE UNITED STATES

No. _____

PAUL E. ENYART, Bankrupt
PAUL E. ENYART - - - - - *Petitioner*

v.

ASHLAND DISCOUNT COMPANY
JOHN SIMPSON, Trustee - - - *Respondents*

JOINT BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

May it please the Court:

I. OPINIONS BELOW

This is a Brief in opposition of the Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, judgment made and entered May 1, 1972. Copies of the Referee in Bankruptcy's Order, the memorandum opinion of the District Court, and the opinion of the United States District Court of Appeals for the Sixth Circuit are set out in full in the Appendix to the petition filed by the petitioner and for that reason are not contained herein.

II. JURISDICTION

The jurisdiction of the Court is based upon Title 28 U.S.C. 1254(1) and Title U.S.C. 45(c).

III. THE QUESTIONS PRESENTED

I.

Did the Referee in Bankruptcy err in the Order dismissing the petition in bankruptcy and was the District Court, the Honorable Bernard T. Moynahan, Jr., Judge, and the Sixth Circuit Court of Appeals wrong when all three found that the creditor had failed to comply with the Section 14c of the Bankruptcy Act which requires that the bankrupt keep or preserve books of account or records from which his financial condition and business transactions might be ascertained?

II.

Did the Referee in Bankruptcy abuse his discretion and deny the bankrupt the right to be fully heard by refusing to grant the CPA hired by the bankrupt forty-five (45) additional days when the bankrupt had had more than a year to present his records?

III.

Is there a reason for granting certiorari under Rule 19 of the Supreme Court where there is no conflict of decisions within another Circuit on the same matter or that some important question of Federal law should be settled by this Court?

IV.

Was the Bankrupt-Appellant entitled to notice that he would be required to have available his records in accordance with good housekeeping practices when the only request for the production of any of his records during the course of the proceeding was the Referee's Order prior to the first meeting of creditors directing the production of records for six (6) months immediately preceding the filing of the bankruptcy petition?

V.

Is it equitable to deny the Bankrupt-Appellant a discharge in bankruptcy for inadequate records to financial transactions dictated and controlled by the objecting Creditor-Respondent, especially since the Trustee in Bankruptcy and the objecting Creditor-Respondents agreed to follow up these transactions with the concurrence of the Referee in Bankruptcy to determine whether there was any impropriety involved?

VI.

Whether a bankrupt who on the date of bankruptcy has a sum of money due him on a contract of sale and subsequent to bankruptcy collects the sum due on said contract before the Trustee in Bankruptcy acquires knowledge to the transaction and disburses the proceeds so received to a creditor of the bankrupt of his own choice, can be required to account to the Trustee for the amount of the sum wrongfully received and disbursed?

IV. STATUTES INVOLVED

11 USC 32(b):

"After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct, and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in section 94 of this title. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard."

11 USC 32(c)(2):

"The court shall grant the discharge unless satisfied that the bankrupt has destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case."

11 USC 32(c)(7):

"The court shall grant the discharge unless satisfied that the bankrupt has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

Order 32. General Orders in Bankruptcy:

"Any person opposing a discharge shall, on or before the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition."

V. THE MATERIAL FACTS CONSTITUTING THE CASE

The Petitioner filed a voluntary petition in Bankruptcy in the United States District Court for the Eastern District of Kentucky at Catlettsburg on 2 December 1968. The Court by proper Order directed the Petitioner to produce the following records and to do the following as set forth in said order:

(1) Attend the creditors meeting.

(2) Submit to an examination under oath concerning the conduct of your affairs.

(3) Cause of your bankruptcy.

(4) Your transactions with creditors and other persons.

(5) The amount, kind and whereabouts of your property, and all other matters which may affect the administration and settlement of your estate.

(6) Or, the granting of your discharge.

FURTHER: Produce for inspection of the Court and creditors:

(7) All books and records of accounts, bank books, bank statements, [sic] check books, cancelled checks for the six months preceding bankruptcy.

(8) Original or certified copies of deeds or contracts under which you hold title to any interest in real estate.

(9) Certified copies of all mortgages and liens or encumbrances upon said real estate, etc.

(10) Contracts of life insurance.

(11) Statement from employer showing wages, salary and commissions earned prior to the filing of your petition in bankruptcy but not yet received by you at such time.

(12) Certificates of stocks, bonds, and keys to any safety deposit boxes.

(13) Your last Federal and State income tax returns.

(14) The title papers to any motor vehicle, house trailer, or boats you own.

The Order further enjoined Petitioner from generally disposing of any and all property pending further order of the Court.

The basic facts herein are set forth in the opinion of the Referee's Finding of Fact and reference for complete detail is incorporated herein and may be summarized briefly:

The Bankrupt-Petitioner is an experienced business man. In 1948 he was employed as a collection man in the field for a small loan office, and in 1951, became manager thereof for four (4) years, he operated a small furniture business at Wurtland, Kentucky, for one and a half years. He has been in business for himself since 1960 (Transcript of hearing 10 December 1969, pages 45-46).

Bankrupt-Petitioner and one Challie Yates, Jr. became partners in a User Car lot under the name of Ashland Recovery Service. Each had been in business prior as partners, "Yates Auto Mart," Respondent-Objecting Creditor floor planned their automobiles and many of Petitioner's car sales to customers were financed by Respondent with full recourse (Tr. 17 February 1969, pages 40-41). During 1964 Yates and Petitioner sold 25-30 cars a week and sold some $600,000.00 worth of cars that year. However, sometime that year Yates informed Petitioner that they were "Out of Trust" and in trouble with Ashland Discount Company (Respondent herein) for $30,000.00 (Tr. 17 February 1969, pages 48-52).

At the end of 1964 Petitioner took over the business and the $30,000.00 "out of trust" liability was divided

equally between Petitioner and Yates, but Yates got in trouble and Petitioner took over *in toto* (Tr. 17 February 1969, pages 54-56).

Separate accounting was done by Respondent for Petitioner and Yates and each signed separate negotiable promissory notes for the individual assets to Petitioner and Respondent, to secure Respondent, furnished divers real estate mortgages, guarantors, etc. to Respondent on 23 December 1966.

On 25 June 1968 Petitioner's used car business was terminated and on 5 March 1968 Petitioner entered the "Model Raceway" business (Tr. 9 October 1969, pages 33-34; Exhibit O to Tr. 10 March 1969, of also Tr. 27 May 1969, pages 44-62).

Prior to 23 December 1966 Petitioner received divers rental income from the real estate mortgaged to Respondent (Tr. 10 December 1969, page 44).

Between June 1968 and 2 December 1968, the filing date of Petitioner's petition in Bankruptcy, the Petitioner engaged in the business of purchasing salvaged or damaged mobile homes (Tr. 9 October 1969, pages 25-32). He had the mobile homes assigned to "Ashland Recovery" real estate because he figured Morgan Driveways would give "us a better transport deal" (Tr. 10 December 1969, pages 44-45).

In October 1969 Petitioner submitted a bid of $1,251.00 to Foremost Insurance Company on a 1969 Holiday Traveler Travel Trailer which was sold for its salvage value by Foremost. Petitioner received a blank bill of sale therefor and notarized the seller's signature (Tr. 27 May 1969, pages 33-44; Tr. 10 March 1969,

page 76; *Id.*, page 35; *Id.*, page 36, Exhibit N to Tr. of May 27, 1969). Petitioner did not pay for the trailer at that time (Tr. 27 May 1969, pages 33-34).

Petitioner was unable to obtain the $1,251.00 to pay for this trailer. His brother agreed to borrow the money and cover the bid (Tr. 10 December 1969, pages 78-79). On or about 21 November, 1968, Petitioner typed the name of his brother, Clifford Enyart, in a blank bill of sale and gave it to him to take to the Clerk of the Greenup County Court to obtain a license for said trailer (Tr. 27 May 1969, pages 34-37, Exhibit N). On 21 November 1968, Petitioner notarized for his brother's affidavit supporting vehicle license application. This application stated that the vehicle described therein (space for description is blank) was brought into Kentucky on 21 November 1969 [sic]. Sometime after this date one Harold Borders picked up the trailer and brought it into Kentucky. It was parked at Petitioner's home when the Bankrupt-Petitioner filed his petition in bankruptcy (Tr. 27 May 1969, pages 30-34). The trailer was not listed as an asset in Bankrupt's petition. The transfer of title is not set out in the Statement of Affairs. All other trailer sales were equally omitted therefrom (Tr. 27 May 1969, pages 25-29).

On the date of bankruptcy, 2 December 1968, Petitioner maintained a checking account in the Second National Bank of Ashland, Ashland, Kentucky, in the name of Ashland Recovery. The balance there was .67 cents. On 6 December 1968, Petitionar wrote a check for $348.16 payable to Holiday Rambler (Ex-

hibit M to Tr. 10 March 1969). This check was for purchase of materials, outside metal, for repair of the 1969 Holiday Traveler Travel Trailer (Tr. 27 May 1969, page 34).

On 9 December 1968, Clifford Enyart borrowed $1,250.00 from another bank and gave said bank a Security Agreement on the trailer which was duly lodged for record (Exhibit N to Tr. 10 March 1969). Clifford Enyart gave the money to Petitioner on 9 or 10 December 1968 with an additional $275.00 for a total of $1,525.00, all of which petitioner deposited in the Second National Bank of Ashland. On 9 December 1968, Petitioner wrote Foremost Insurance Company a check for $1,171.00 in payment for the net balance on the trailer (Exhibit M to Tr. 10 March 1969; Tr. 10 March 1969, pages 60-61).

Bankrupt-Petitioner omitted one Thunderbird automobile, year 1955 (Tr. 27 March 1969, pages 62-64; Tr. 10 December 1969, pages 63-64) conveyed the title to one Meade from McNeal (Exhibit No. 5 to Tr. 10 December 1969; Tr. 10 December 1969, pages 69-74); Petitioner paid off the floor plan on the Thunderbird on 30 October 1968 (Tr. 27 May 1969, pages 70-71). Petitioner retained the proceeds of sale of the Thunderbird on 24 February 1969 and used it to pay off the floor plan of another car and to pay rent (Tr. 10 December 1969, page 75). He paid off the floor plan on the Thunderbird eight months later to Respondent with funds from other sources (Tr. 9 October 1969, page 43).

The Bankrupt-Petitioner admits he has not filed State and Federal income tax returns for the calendar

years 1965, 1966, 1967 and 1968 (Tr. 9 October 1969, pages 14, 22-23). Neither is it clear that he filed State and Federal withholding returns for those years (*Id.*, pages 5-6).

The Bankrupt-Petitioner maintained three bank accounts: One in the name of Ashland Recovery Auto Sales in the First National Bank of Ironton, Ohio; one in the name of Ashland Recovery in the Second National Bank of Ashland, Ashland, Kentucky, and a joint personal bank account with his wife in First and Peoples Bank of Russell, Kentucky.

He used all these accounts rather indiscriminately in the conduct of his business affairs (Tr. 9 October 1969, pages 14-15). He has not produced all the cancelled checks written on these accounts (Tr. 9 October 1969, page 77).

The Bankrupt-Petitioner maintained a ledger book of everything paid by check, by date, check number, payee and amount (Tr. 9 October 1969, page 15) but there are *no* entries in the ledger book for the eleven months of the year 1968 preceding bankruptcy (Tr. 9 October 1969, page 18).

Petitioner testified he had receipt book showing his income from rental property, but the receipts had not been entered in a ledger book, had not been turned over to the Trustee at the time of the initial hearing on the specifications of objections to discharge on 9 October 1969 (Tr. 9 October 1969, pages 77-79).

The Bankrupt-Petitioner did not have any composite record of income, expenses for taxes and upkeep,

depreciation or net profit from rental property (Tr. 9 October 1969, pages 20-21).

Bankrupt-Petitioner did not keep a copy of the Bill of Sale to each car he sold (Tr. 9 October 1969, page 21). He testified he had copies of the financing statements covering the cars he had sold during 1967 and 1968, but these had never been delivered to the Trustee, or to the Bankrupt's accountant (*Id.*, pages 21-22). There was no separate record of cash payments received by Petitioner as down payments on the purchase of cars, other than as noted on the purchase order covering the sale of cars (*Id.*, page 23). The Petitioner did not keep ledger cards covering the sale of cars for which he was to be paid in installments, but merely noted receipts on the sales slips (*Id.*, page 23). None of these records have been turned over to the Trustee (*Id.*, page 24). The Bankrupt-Petitioner had no record of the total amount of auto sales for the years 1966, 1967 and 1968 (*Id.*, page 25).

The Bankrupt had no record of his gross income from trailer sales during 1968. His testimony was that he would have to reconstruct this from cancelled checks and receipts on a month to month basis. He admitted that the income from trailer sales was used for living expenses and might not have gone into any checking account (*Id.*, pages 30-31; Tr. 10 December 1969, pages 16-17).

The Bankrupt-Petitioner kept no written inventory of the Model Raceway business (Tr. 10 December 1969, page 34). He produced no books or records relating to that business other than the agreement filed as Ex-

hibit O to the transcript of testimony of 10 March 1969 covering acquisition of the equipment for the business.

On one occasion the Petitioner collected $1,300.00 in full payment for the "Cline car." The purchase contract had been assigned to Respondent by Petitioner. Petitioner misappropriated this payment and paid it out in cash (Tr. 10 March 1969, pages 50-52).

The Bankrupt had no record of how many cars financed with Respondent with recourse had been repossessed and returned to his lot during the years 1966, 1967 and 1968 (*Id.*, pages 53-54).

Petitioner had no record of the amount of money he withdrew from his used car business for personal living expenses for 1966, 1967 and 1968, and admitted he submitted no lists of inventories of the car lot or other assets to the local taxing authorities for those years as required by local and state laws (*Id.*, pages 56-57).

Counsel for Petitioner conceded that information from the petitioner's records had not been collected and had been neglected for several years (Tr. 9 October 1969, page 76).

In 1965 Petitioner employed one C. J. Rice to do his tax work and to keep his books. For some reason, Petitioner did not discover until 1967 (two years or so later) that Rice was not doing this work (Tr. 9 October 1969, pages 68-70).

On or about the date of the filing of the Specifications and Objections to Discharge, 31 July 1969, Petitioner contacted one Ira Smith, a C.P.A., about putting the Petitioner's book and records in order (Tr. 10 De-

cember 1969, pages 14-15). The C.P.A. did not receive the records and actively begin work thereon until 60-70 days later, after the initial hearing on the Specifications of Objections to Discharge held 9 October 1969 (*Id.*, page 8). The C.P.A. was of the opinion that an interested creditor or Trustee could *not* have ascertained the financial condition of the Petitioner from the records in the condition of the Petitioner from the records in the conditions they were delivered to the C.P.A. (Tr. 10 December 1969, page 16). Also the record shows Petitioner made frequent withdrawals from the used car business in the form of cash and the record is not clear as to how these withdrawals were accounted for (*Id.*, pages 53, 59-61).

The Court is directed to the Transcript of Evidence, 9 October 1969 in its entirety. This entire transcript relates to questions of importance to any business man in relationship to the basic requirements of record keeping; i. e., gross sales, beginning inventory, cars purchased, ending inventory, cost of sales, gross profit, expenses such as rent, salaries and commissions, utilities, gasoline, parts, equipment and supplies, taxes paid, transfer and license expenses, depreciation, social security withheld and paid, miscellaneous and any and all other legal deductions such as cars paid off to Respondent on recourse. Petitioner had no records (Tr. 9 October 1969).

The Court will recall that Petitioner filed his petition in bankruptcy on 2 December 1968, that the initial hearing on the Specification to Discharge was held on 9 October 1969 and the next hearing thereon was held

10 December 1969 and no records had appeared in any form that would enable anyone to ascertain the financial position of Petitioner for any part of 1968 plus the preceding years. No tax returns for 1966, 1967, 1968, have yet been filed with the Trustee as of the date of this Brief.

VI. ARGUMENT

11 U.S.C. § 32(c) (Section 14 of the Bankruptcy Act) states:

> "The Court shall grant the discharge unless satisfied that the bankrupt has
>
> "(2) destroyed, mutilated, falsified, concealed or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the Court deems such acts or failure to have been justified unless all the circumstances of the case; or
>
> "(4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors, or
>
> "(6) in the course of a proceeding under this Act refusal to obey any lawful order of, or to answer any material question approved by the Court; or
> "(7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities; or

"Provided, that if, upon the hearing of an objection to discharge, the Objector shall show to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision C, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

The Respondent filed its specifications and objections to discharge against Petitioner and reluctantly, even though it places a burden upon this Court, respectfully request that the Court read the transcripts of the five hearings, 17 February 1969, 10 March 1969, 27 May 1969, 9 October 1969 and 10 December 1969 in order to fully understand the Petitioner's complete and flagrant disregard of the first lawful Order of the Referee specifically to the Petitioner, specifically ordering the Petitioner to bring to the first meeting of creditors:

(1) All books and records of account, bank books, bank statement (sic), check books and cancelled checks for the six months preceding bankruptcy.
(2) Contracts of life insurance.
(3) Statement from your employer, etc.
(4) Certificates of stock, etc.
(5) Your last Federal and State income tax returns.
(6) The title papers to any motor vehicles, house trailers or boats you own.

In response to this Order, Petitioner brought a small box of what purported to be records and one ledger showing some eight or nine months of 1966 (Tr. 17 February 1969, page 12; Question 31, Answer 31).

The Petitioner's lack of records, his failure to keep and preserve such records, and his patent, almost naive complete disregard for any type of orderly conduct of and maintaining even such simple records of a receipt book and a check reflect his attitude and is shown clearly through all five hearings. The Petitioner has, by his own testimony and actions, shown himself to be a "hippocket" business man.

Respondent submits Petitioner didn't change his overall lack of concern for records up to and after the filing of his petition in bankruptcy, and to the date of the writing of this Brief.

Petitioner submits no answer to what has been made apparent in this record showing the Petitioner's complete disregard for any lawful compliance to either the Internal Revenue Code or of this Act.

Petitioner and his attorney consistently attempted to show Petitioner was not a bookkeeper, that he knew little or nothing about it, etc. Yet Petitioner admitted he was the Manager of a small loan company and was not only charged with supervising this complicated accounting system but also had to check it personally. He also operated a furniture store for a year and a half.

On the hearing on 10 December 1966 transcript, pages 54 and 55, Counsel for the Trustee asked:

"Q. 33. Well, could you from the records that you had in your business in the Ashland Recovery,

were you able to look at the records you had at the end of the year and determine whether or not you had a profit or a loss?

A. 33. No, I never had it down in this type of form. It was not compiled at the end of the year. The end of the year was just like any other day."

Petitioner simply couldn't be bothered, payment of taxes apparently never entered his head.

The law, both statutory and case law, is well settled in the failure to keep records category of this problem:

"A bankrupt must either produce such records as are customarily kept by a person doing the same kind of business or he must justify to the Court his failure to produce them; after the Creditor has shown the absence of any adequate records, the burden falls upon the bankrupt of satisfying the Court that his failure to produce them was justified." *In Re Rose* (D.C. N.Y. 1943), CCH Dec. 54360.

"Where the evidence amply supported a referee's ruling that the bankrupt failed to keep or preserve books of financial transactions, the burden of proving that he had not committed any of such acts fell upon the bankrupt and his inability to meet this burden of proof resulted in the denial of a discharge." *Ginzburg* v. *Johansen* (CA-5, 1962), 300 Fed. 2d 40, CCH Dec. 60,341.

The Courts have gone further, consider, in the case:

"The Trustee in bankruptcy filed several specific objections which were eventually narrowed to failure to submit the proper books and records to

explain certain transactions which were improper on their face. The Referee found that the debtors had failed to keep the proper books and records, and debtors contended that the transactions would have been explained by records contained in a large carton of assorted miscellaneous records. The Court stated that the burden on the debtor to disapprove the specifications of the Trustee, and this burden was not met by reference to a mass of records, with the expectation that the Court or Trustee would search all of them, or examine each one." *In Re Berkowitz,* USDC Southern District of N. Y., No. 89745, 11 June 1965, CCH Dec. 61, 395.

"The law does not require records to be kept in any special manner, but they must be adequate and reasonable for the type of business carried on by the individual." *In Re Case* (D.C. N.Y. 1961), CCH Dec. 60, 218.

The Court in the case of *In Re Shapiro* (D.C. P.S. 1953), 110 Fed. Supp. 228, CCH Dec. 57, 787, holds:

"Evidence revealing that after filing a voluntary petition in bankruptcy the bankrupt withheld his books of account from the Trustee in bankruptcy sufficed to sustain the referee's refusal of a discharge."

Specifically the Courts have ruled on the specific item of lack of records or failure to keep adequate records as such lack of records apply to the keeping of inventory records by holding:

"Failure of the bankrupt to preserve records of physical inventory resulted in the denial of a dis-

charge. The bankrupt had taken physical inventory only at six month intervals in order to obtain financing. However, after each report to the credit agency, he destroyed the detailed records, and retained only the total asset figure. Such a practice violated the Bankruptcy Act books and records provisions." *In Re Kay* (D.C. N.Y.), CCH Dec. 60, 350.

By the same token Courts have carried the burden of keeping records to this extent:

"A Commissioner's findings that the bankrupt continued to conduct his business after a petition in bankruptcy was signed without keeping records of any kind was sufficient to sustain a denial of discharge." *In Re Duca* (D.C. N.Y. 1958), CCH Dec. 59, 252.

In this case, Petitioner has made repeated statements pertaining to his records that many of them were still at his home. They have not been delivered to the Trustee as of the time of this writing. Both the Act and Internal Revenue Code places the burden squarely and unequivocally on any person engaged in business or working for another as the records pertain to proof of financial condition. The District Court of the Eastern Division of Pennsylvania speaking through Circuit Judge Freedman said:

"A bankrupt was denied a discharge under Section 14C(2) of the Act because he failed to present books of account and financial records. The Trustee's examination of the bankrupt's records revealed that they were incomplete. The record dis-

closes that prior to bankruptcy the records had been stored in open cartons in the bankrupt's garage." *In Re Rubin* (D.C. Ed. Pa. No. 25974, September 24, 1964), CCH Dec. 61, 239.

In the same light this appropriate case which is on "all fours" with the case at bar:

"The failure of a bankrupt to keep books and records from which his financial condition and business transactions could be determined resulted in the denial of a discharge in bankruptcy. The bankrupt turned over old records to the Trustee, but nothing was given from which the Trustee could get an accurate look at the situation of the bankrupt for the period within one year of the filing of the petition." *In Re Kenny* (D.C. E.D. of Tenn. N.E. Div. No. 8842, 9 August 1968), CCH Dec. 63, 013.

The Court in the Ninth Circuit case cited below has stated the primary requirement for the objecting creditor to establish, and that is:

"We must keep in mind that the Appellant (Bankrupt) was before the Referee on at least four different occasions attempting to give an explanation of why he didn't keep better books or records and on the issue of what happened to the books and records which he had kept, some of which, evidently disappeared after the adjudication and between the hearing. We are not here discussed in *In Re Heathcock,* 165 Fed. Supp. 182 (M.D. N. C. 1958). Moreover, the concurrent findings of the Referee and the District Court are not to be set

aside except upon a clear demonstration of a mistake." *Hillard* v. *Hollens,* 290 Fed. 2d 263, 265 (6th Cir. 1961).

The Court goes on:

"The record clearly supports the Referee's findings and that of the District Judge that the Appellant (Bankrupt) failed to establish a justification for not keeping books of account or records from which his business transactions might be ascertained. *On this issue, the objecting creditor need merely show that there are reasonable grounds to believe that the Appellant committed the Act and the burden affirmatively disproving commission or of establishing justification then shifts to the Appellant.*" Collier on Bankruptcy, Volume 1, pages 1370-1371; *Nis* v. *Sternberg,* 338 Fed. 2d 611, 612 (8th Cir. 1930).

Respondent submits to the Court that it has met, joined, surmounted and overwhelmed its requirements on the question of "Records." Petitioner has offered no justifiable reason for his failure to keep and maintain adequate records for any period of time. Petitioner was and is a business man, "Hippocket operator" perhaps, but a business man who can read a balance sheet.

It is apparent from the cases cited herein that Respondent did not have the burden of demanding any records from Petitioner. The law confers the right upon Respondent for Petitioner to have adequate records so that his financial condition could be ascertained. No notice requirement is necessary. Respond-

ent learned at the first meeting of creditors that no tax returns had been filed for 1966, 1967 and 1968 from Petitioner's own admission. Petitioner had some two to two and one-half months' notice when the specifications and objections to discharge was filed. The pleadings set forth the grounds.

The Referee did not abuse his discretion in not granting Petitioner an additional forty-five (45) days. It would have taken ninety (90) days to separate and get his "papers" into a recognizable form to set up a set of books. Witness Smith, the C.P.A., stated no laymen could take these records as delivered to him and make anything out of them. The Referee was the very epitome of judicial fairness to Petitioner and his Counsel all through all five hearings plus the first meeting of creditors. Respondent submits to the Court that the Referee "leaned over backwards" to be lenient with Petitioner and his Counsel. The additional time requested by Petitioner (45 days) was an encroachment upon the time of the Referee, the Trustee, his Counsel, Respondent's people and Respondent's Counsel. The petition was filed 2 December 1968. The last hearing was in December 1969. It is submitted Petitioner had all the time in the world to have had his records adequate.

VII. CONCLUSION

In conclusion it is respectively submitted that the bankrupt was afforded ample opportunity to be fully heard on the issue relating to the adequacy of his records and there is no inconsistency in the finding and interpretation of the District Court and the District Court of Appeals in its interpretation of 11 USC 32(C). If there was any inconsistency existing only in the minds of Counsel for the Petitioner and surely not in the minds of the Court. There is no Federal question involved, no inconsistency in the ruling of any Circuit Court of Appeals pointed out by the Petitioner and the petition for certiorari should be denied.

JOHN MARION WILLIAMS
Second National Bank Building
Ashland, Kentucky 41101

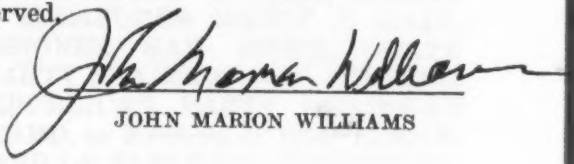
JAMES E. ADKINS
ADKINS AND ADKINS
2813 Louisa Street
Catlettsburg, Kentucky 41129

JOE R. MASSEY, JR.
203 Kitchen Building
Ashland, Kentucky 41101

Counsel for Respondents

PROOF OF SERVICE

I, John Marion Williams, Attorney for Respondent herein, hereby certify that on this 26 August 1972, three copies of the Joint Brief In Opposition were mailed first class, postage prepaid, to John T. Diederich and Michael R. Dowling, 500 Price Building, Ashland, Kentucky 41101. I further certify that all parties required to be served have been served.



JOHN MARION WILLIAMS